

CSKT – MONTANA WATER RIGHTS COMPACT

BACKGROUND

- The Montana legislature established the Montana Reserved Water Rights Compact Commission in 1979 to help integrate reserved water rights into the state adjudication process. MCA 2-15-213. A federal reserved water right is created when a Treaty or other federal action sets aside federal land from the public domain. The water right then carries the priority date of the reservation of the land, even though the water for the land might not be put to use at that time. The Commission is charged with negotiating water rights “compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.” MCA 85-2-701(2) and 702.
- The Confederated Salish & Kootenai Tribes (“Tribes”) and the Compact Commission have provisionally agreed to a water rights settlement (the “Compact”), and intend to ask the Montana Legislature to ratify it during the 2013 session. Congress and the Tribes must also give final ratification to the Compact. MCA 85-2-702. Once the sovereigns have approved it, the Compact must be approved by the Montana Water Court.

COMPACT BASICS

In general the Compact:

- Provides protections for all current water users for non-irrigation rights in all affected water basins on- and off-reservation from the Tribes’ exercise of their water rights.
- Provides Protection for on-reservation irrigators within the Flathead Indian Irrigation Project (FIIP) through a Water Use Agreement still being negotiated among the Tribes, the Flathead Joint Board of Control and the United States.
- Provides protection for other on-reservation irrigators either through the opportunity to protect a level of water use from call similar to the level of water use FIIP irrigators will have or through limitations on the enforceable levels of certain other tribal instream flow rights (whichever method is geographically appropriate).
- Provides water for the Tribes for existing and future tribal water needs on the Reservation.
- Recognizes off-reservation instream flow rights for the Tribes, to which they have strong legal claims as a result of particular language in the 1855 Hellgate Treaty.
- Provides processes for the Tribes to lease portions of their water rights to on- and off-reservation users.
- Establishes a Water Management Board and a Unitary Management Ordinance (“Law of Administration”) to govern the administration and enforcement of all water rights within the boundaries of the Flathead Reservation, plugging the regulatory void that currently exists as a consequence of a series of Montana Supreme Court decisions. Appeal of Board decisions available to court of competent jurisdiction.
- No change to any off-reservation jurisdictional arrangement (e.g, for water rights, water quality, species management).
- Provides for an allocation of 90,000 acre-feet of water stored in Hungry Horse Reservoir for the Tribes to use or market, of which 11,000 acre-feet must be made available for lease for off-reservation mitigation.
- In exchange for benefits recognized by the Compact, the Tribes agree to waive and relinquish all other water rights claims they could otherwise make in Montana.

CSKT TRIBAL WATER RIGHT INSTREAM FLOWS

- On-reservation instream flow rights recognized at several dozen specific measurement points.
- Exercise of on-reservation instream flow rights that overlap with streams used by the FIIP to be governed by FIIP Water Use Agreement. Still under negotiation between CSKT & Flathead Joint Board of Control.

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- Off-reservation time immemorial instream flow rights on mainstems of Kootenai, Swan and Lower Clark Fork Rivers and Placid Creek. Limitations on enforcement of these rights provided in the Compact.
- Co-ownership of various water rights held by MFWP in Bitterroot, Flathead and Blackfoot River Basins. Co-ownership of FWP claims in Kootenai Basin still under discussion in wake of opposition from Lincoln County.
- Co-ownership of former Milltown Dam water right. Change in purpose of that right from hydro to fisheries made by legislative approval of Compact rather than through DNRC change process.
- Beneficial interest in contracts for stored water owned by MFWP in the Bitterroot (from Painted Rocks Reservoir and Lake Como).

OTHER WATER USES

- FIIP right made part of Tribal Water Right. Exercise of FIIP right subject to FIIP Water Use Agreement.
- Water right from mainstem of Flathead River (“Flathead System Compact Water”) for future development or lease. Right backstopped by 90,000 acre-feet from Hungry Horse.
- Minimum pool water right for Flathead Lake at elevation of 2883 feet above mean sea level.
- Water right for wetlands and high mountain lakes located on trust lands.
- Water right for Boulder Creek and Hellroaring hydroelectric projects (tribally owned).
- Water right co-owned with MFWP or USFWS (as applicable) for wetlands on lands owned by MFWP/USFWS.
- Water rights for tribal religious and cultural uses and other existing tribal uses confirmed.

ADMINISTRATION

- Water Management Board (WMB) composed of five members, two appointed by governor, two by Tribes, fifth by the four appointed members. One non-voting member appointed by US.
- WMB applies Law of Administration (LOA), which is only effective if enacted in parallel into State and Tribal Law. LOA may only be amended if both State and Tribes enact parallel amendments.
- LOA applies equally to tribal members and non-members. Governs issuance of new water rights and authorizations to change existing water rights, and enforcement. Largely but not completely mirrors Montana Water Use Act. Retains (though at different volume levels) State law exceptions for streamlined permitting of small domestic and stick uses.

CONTRIBUTIONS TO SETTLEMENT

- Governor Schweitzer’s budget contemplates \$55 million State contribution to settlement. Of the \$55 million, \$30 million is envisioned as going to the FIIP to help defray increased pumping costs and for other needs as part of the implementation of the FIIP Water Use Agreement; \$4 million for stockwater mitigation to wean FIIP water users off stock water deliveries outside irrigation season; \$8 million for implementation Compact (including implementation of FIIP Water Use Agreement); and \$13 million to Tribes for Habitat Enhancement Fund (part of compromise over settlement of Tribes’ on- and off-reservation instream flow water rights claims).
- Federal funding at a level to be set in the congressional ratification bill. Funding levels generally set after tribal-federal negotiations and roughly benchmarked to federal programmatic responsibilities and litigation exposure.

Legislation

- LC0291 – Ratify water rights compact with CSKT – Requester D.Wanzenreid
- LC0867 – Implement negotiated water compacts with MT tribal governments – Requester A.Blewett
- LC1174 – Implement tribal water compact – Requester D.Salomon

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